

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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APR -9 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

AUNDRA Z.,)	2 CA-JV 2009-0124
)	DEPARTMENT A
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC)	Appellate Procedure
SECURITY; HAZIAH Z., NEVAYEH Z.,)	
and RAEJEAN Z.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. JV 16371900

Honorable Kathleen Quigley, Judge Pro Tempore

AFFIRMED

Sarah Michèle Martin

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Michelle R. Nimmo

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

K E L L Y, Judge.

¶1 Aundra Z. appeals from the juvenile court’s order terminating his parental rights to his children Haziah, Nevayeh and Raejean (the children) on grounds of mental illness and chronic substance abuse, *see* A.R.S. § 8-533(B)(3), and length of time in care under § 8-533(B)(8)(a) and (c). Aundra contends the evidence presented at the termination hearing was insufficient to support the juvenile court’s order. He also contends the court erred by precluding evidence at the termination hearing relevant to motions he had filed during the dependency regarding the children’s placement and by denying those motions without an evidentiary hearing. For the following reasons, we affirm.

¶2 To justify termination of Aundra’s parental rights, the Arizona Department of Economic Security (ADES) had the burden of proving by clear and convincing evidence at least one of the statutory grounds for severance and by a preponderance of the evidence that severance was in the children’s best interests. *See* § 8-533(B); A.R.S. § 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). “The juvenile court, as the trier of fact in a termination proceeding, is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings.” *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). Thus, on review, “we will accept the juvenile court’s findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous.” *Id.*

¶3 Aundra's children were adjudicated dependent in August 2007 after he and their mother admitted to allegations in an amended dependency petition. As to Aundra, those allegations included his having tested positive for the drug "PCP" in April and May 2007, his history of domestic violence with the children's mother, his failure to comply with drug testing and counseling requirements of his probation, and his failure to comply with the drug screening protocol included in voluntary services ADES had been providing since April 2007.

¶4 The original case-plan goal of family reunification was changed to severance and adoption in January 2009, after Aundra had failed repeatedly to comply with drug-testing requirements of the reunification plan or to benefit substantially from the reunification services. At the court's direction, ADES filed a motion to terminate Aundra's parental rights, and a contested termination hearing was held in August 2009. The court terminated Aundra's parental rights in an under-advisement ruling containing its findings of fact and conclusions of law.

¶5 On appeal, Aundra contends ADES "failed to present clear and convincing evidence of parental unfitness under A.R.S. § 8-533(B)(3) sufficient to justify termination of [his] parental rights." A parent's rights may be terminated under § 8-533(B)(3), upon clear and convincing proof of the parent's inability "to discharge parental responsibilities because of mental illness, mental deficiency or a history of chronic abuse of dangerous drugs, controlled substances or alcohol" and "reasonable grounds to believe that the

condition will continue for a prolonged indeterminate period” of time.¹ The juvenile court found these elements had been proven under the applicable standard. Aundra appears to contend such a finding was unjustified because (1) he had successfully completed a three-year probationary term, during which he had been required to undergo urinalysis, and (2) his evaluating psychologist had been unable to offer an opinion about his parenting abilities at the time of the termination hearing because the evaluation had taken place approximately fourteen months earlier.

¶6 At the termination hearing in August 2009, Aundra admitted he had a history of substance abuse and had been “real strong into it” approximately two years earlier. He admitted he had tested positive for PCP in April and May 2007. He also testified that in June 2007 he had been on probation in a criminal matter for approximately eighteen months and had remained on probation until approximately six months before the termination hearing. He maintained that, as a condition of his probation, he had been required to submit to urinalysis testing three times per week, had complied with this requirement, had always “dropp[ed] clean” when testing for probation, and had been successfully terminated from probation.

¹To justify termination under § 8-533(B)(3), ADES must also have made reasonable efforts to reunify the family or prove such efforts would have been futile. *See Jennifer G. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 450, ¶ 12, 123 P.3d 186, 189 (App. 2005). Aundra has not asserted on appeal that ADES failed to make reasonable reunification efforts in this case.

¶7 The ADES caseworker had stated in a September 2008 report to the juvenile court for the permanency planning hearing that Aundra's "participation with drug screens for his probation . . . [was] not sufficient for [ADES]," because those screenings were "scheduled" and Aundra knew when he would have to test. Indeed, as noted above, Aundra tested positive for PCP twice during the time he was allegedly testing negative for the probation department. Aundra admitted at the severance hearing he had spoken to the case manager about the "difference between the probation drop protocol and the CPS protocol"; he had been aware that he had to test separately for ADES and had been advised that a failure to call or "drop" when required would be considered a "dirty drop."

¶8 In the April 30, 2009, progress report, which was admitted in evidence at the termination hearing, the caseworker stated that Aundra had, at best, minimally complied with the ADES drug testing protocol and that his test compliance rate as of November 2008 had been zero percent. The report also noted that Aundra had failed to attend family drug court, as required by his case plan and, although Aundra had completed a substance abuse assessment in July 2007, he had failed to complete his intake for a treatment program.

¶9 Psychologist Michael German evaluated Aundra in April 2008 and diagnosed him with an anti-social personality disorder with narcissistic features. He also diagnosed "PCP abuse, in remission by self-report," stating that Aundra had "started using marijuana at seventeen and used it until about nineteen or twenty when he started

PCP. He ended up selling PCP. He tried cocaine, but did not like it. PCP and marijuana have been his drugs of choice.” Although he testified at the termination hearing that he could not give an opinion about Aundra’s present ability to parent, he had opined in his 2008 report that people with a psychological profile like Aundra’s “often say they are going to do better and they seem genuine in their commitment, but the long-term prognosis for change is poor.” He stated, “We can hope for a change in [Aundra’s] long-standing behavioral style, but the chances have to be considered minimal.”

¶10 German’s diagnosis and prognosis, coupled with Aundra’s own behavior in failing to comply with case-plan tasks designed to address his substance abuse issues, support an inference that Aundra was, at the time of the termination hearing, unable to discharge his parental responsibilities and that this condition would continue for a prolonged, indeterminate period of time. The above described evidence was more than sufficient to support the following conclusions the court expressed in its termination order:

Substance abuse is at the heart of Father’s case Father testified that he tested for his probation officer and his tests were clean. His testimony is not credible, given his failure to test as required for CPS, and his claim is unsupported by the evidence. Father understood that he needed to follow the drug testing protocol for both CPS and Probation because probation’s drops were on a regular schedule and CPS drops were random. Father failed to comply with drug testing for CPS. He chose the dates he would call in and the dates he would test. [ADES] has proven by clear and convincing evidence that Father is unable to discharge parental responsibilities because of a history of chronic substance

abuse and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.

¶11 Because sufficient evidence supports the juvenile court's determination under § 8-533(B)(3), we need not address Aundra's arguments regarding the other statutory grounds the court found for severance. *See Jesus M.*, 203 Ariz. 278, ¶ 3, 53 P.3d at 205 (appellate court need not consider challenge on alternate grounds for severance if evidence supports any one ground).

¶12 We also conclude that sufficient evidence supported the juvenile court's finding that ADES had proven by a preponderance of the evidence that termination was in the children's best interests. Evidence that a child will derive an affirmative benefit from termination is sufficient to support such a determination, and "the juvenile court may rely on evidence that [a] child is adoptable and the existing placement is meeting the child's needs." *Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, ¶ 15, 200 P.3d 1003, 1008 (App. 2008). The ADES caseworker testified that the children were doing well in foster care, that they were adoptable, and that their current placements were considering adopting them. Aundra has identified no evidence contradicting or undermining the caseworker's testimony. Thus, the court's findings on the best interests of the children are supported by the record.

¶13 Finally, Aundra contends the juvenile court erred by "precluding evidence relevant to [Aundra's] placement motions and denying [Aundra's] motion for change of placement without evidence being presented." But Aundra has not shown that any such

evidence relevant to his placement motions was also relevant to the termination proceeding. And, as ADES points out, and Aundra concedes, with the termination of Aundra's parental rights he lost standing to challenge the court's decisions regarding the children's placements. *See Antonio M. v. Ariz. Dep't of Econ. Sec.*, 222 Ariz. 369, ¶ 2, 214 P.3d 1010, 1011 (App. 2009).

¶14 For the foregoing reasons, we affirm the juvenile court's order terminating Aundra's parental rights to the children.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge